SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.
No. 211.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ALLINE A. DIXON, ADMINISTRATRIX OF THE ESTATE OF CHAUNCEY A. DIXON, DECEASED,
Defendant in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ARGUMENT FOR THE DEFENDANT IN ERROR.

BY A. M. ANTROBUS, *Attorney.*

D. J. O'CONNELL AND
R. J. BURGLEHAUS,
Of Counsel for Defendant in Error.

(18,826.)

ARGUMENT.

I.

The first question certified to this court is: "When a local telegraph operator is called upon *specially* by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense, that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher, that was induced by false information given by the local operator?"

Under the certified facts, is the question material? Complainant stated, "that it was the duty of defendant when it undertook to run said trains in opposite directions on the same track, to frame and promulgate a special schedule, and give such orders, and use such physical means for their running, with the knowledge of the conductor of train No. 162, which, when obediently observed by him, would be reasonably safe for those engaged in their operation. That the defendant failed to discharge this duty, in that it gave such orders, and used such physical means for the running of said trains, that resulted in the collision that caused the death of her intestate." The charge is definite as to the duty of the company, and the facts are admitted which show the collision was the result of making Bo-

nita a meeting point for the trains to pass after train 162 had passed it, and without giving information to the operatives of 162 either actually or constructively of the danger to which they were exposed. Under these facts, the real question is: did the company owe a positive duty to the trainmen of 162 when it sent 159 west from Garrison or Drummond, to make a meeting point where the trains could pass in safety, and in some manner notify trainmen of 162 of this place, to avoid impending danger? If it did, then the negligence of the operator has nothing to do with the matter of fixing the liability of the company, because it ought not to be permitted to shift the burden of its duty on an inferior servant, and allowed to escape liability for the negligent doing of that which was its duty to have carefully performed. That if it shall be permitted to go behind the train dispatcher, then, as it was its duty under the circumstances to make a place where the trains could pass one by the other in safety, the operator was discharging a master's duty. Such being the case, in no sense was he a fellow servant of the trainmen on 162. The court in deciding this case said:

"It is undoubtedly a rule of law, and a reasonable one, that a railroad company should provide safe schedules of times for the running of trains, so that there will be no danger of collisions, if the times were observed by the men in charge of the trains running thereunder; and if from any reason, the ordinary schedules have to be departed from, as they are continually, still it is the duty of the railroad company under such circumstances, to use reasonable care to advise those in charge of other trains on the road of the movement of such trains, so as to avoid collisions."

Will the authorities sustain the holding of the court? In *Baltimore & O. R. R. Co. vs. Andrews*, 1. C. C. App., 639, the court said:

"Besides there is no difference in principle between the regular printed time table or schedule and a special schedule or time table sent by telegraph. In either case the movement of the train is directed by the company, and in both cases the control and management of the train under way, whatever the orders, are vested in the conductor and engineer."

The company directs when it shall start, when and where it shall stop, and when and where it shall pass other trains. To accomplish this, it gives certain orders to the conductor through its train dispatcher, and while the train is being moved it is under the control of the conductor. In *N. P. Ry. Co. vs. Poirier*, 15 C. C. Apps., 52, the facts were: Two trains were running in the same direction very close together. The first or head train was a regular freight running under schedule time. The second was running under telegraphic orders. The first stopped at Clyde Spur to side-track some empty cars. While thus engaged, the second train ran into its rear end, on account of which the middle brakeman of the first received injuries while attempting to uncouple cars. There was no evidence that the conductor of the second train violated his orders. The proofs showed that he was not notified that the first train would stop at Clyde Spur. The court on page 60 says:

"It was the duty of the defendant when it put the second train in motion to make suitable provision and exercise reasonable and ordinary care for its safe management to guard against accidents. This was a positive duty, which it owed to its employes; and if this

was delegated to any particular agent, and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the company. This principle is distinctly announced in the Baugh case."

In the case cited, the company owed the duty to notify the conductor of the second train that the first would stop at Clyde Spur, to guard against collision. In the case at bar, 162 had left Missoula and was on its was east, running obediently with its orders before 159 was sent west from Garrison. When the company sent west 159 from Garrison, or Drummond, it owed a duty to train operatives on 162 to make a point for the trains to meet, and in some manner notify them of this fact. It matters not to whom it entrusted this duty, nor his position. If the company owed the duty, and the duty was not performed, then there was a violation of it, and whosoever brought about the violation must have acted in the place of the company, and could not have been in the very transaction a fellow servant of the train operatives, who were running their train in obedience to orders given them. It matters not whether it was a train dispatcher or a local operator that caused the violation of the duty of the master to the train operatives; that person could not be a fellow servant of the trainmen in such sense as to exhonerate the master from liability caused by a violation of duty which it owed its servants.

Lewis vs. Seiffert, 11 Atl., 514, is a well considered case. The court lays down the doctrine, that it is as much the duty of a railroad company to give *correct* orders for the movement of trains, as it is to provide

a reasonably safe road, cars, locomotives and machinery for the operation of its road. The court says:

"But there are some duties which the master owes the servant, and from which he cannot relieve himself except by performance. He owes the duty to every employe of providing a reasonably safe place in which to work, and reasonably safe tools and machinery with which to work. This is a direct, personal and absolute obligation, and the master may delegate those duties to an agent, and such agent stands in the place of the master. It is therefore very plain, that it was the duty of the defendant, as between it and its employes, to provide a reasonably safe road, good cars and machinery for operating its road. It is equally its duty to frame and promulgate such rules and *schedules* for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them. This is a direct an positive duty, which the company owed its employes, and for the failure to perform which, it will be responsible to any person injured in consequence thereof, whether such person be passenger or employe."

The court further on in the opinion says, that it would be a monstrous doctrine to hold otherwise. There are a line of cases in which the facts are, that the orders given for the movement of the trains were correct, but because the operator failed to deliver them to the conductor, to whom they were addressed, and the train was permitted to go ahead, which brought about a collision. In these cases, under the facts stated, the courts hold: First, that it is a positive duty of a railroad company to give *correct* orders for the movement of its trains, and in some way notify train operatives of a change of schedule. That when it has given correct orders, and sent them by telegraph to the local operator to be by him delivered to

the conductor on the arrival of the train, it had performed its duty. That in the act of manual delivery of the order by the operator, his act in this respect is that of a fellow servant with the trainmen. That he acts as a messenger boy between the dispatcher and conductor.

In *R. R. Co. vs. Camp*, 13 C. C. Apps., 233, the facts are, correct orders making a meeting point for the trains had been sent to the local operator before the arrival of the train, which he failed to deliver, and because of such failure, the train proceeded on its way and collided with another. The contention was, that it was the duty of the company to bring to the actual knowledge of the conductor the contents of the order. The court on page 240 of the report says:

"Again, the railway company is bound to provide general rules and general time tables for the reasonably safe operation of its railway system, and also rules applicable to all emergencies likely to arise. It is inevitable that at times and in certain emergencies the general time table must be set aside. *It then becomes the duty of the company to construct a temporary time table with such care and skill, that it may be reasonably adapted to secure the operation of all the trains on the road without accident to passenger or employe.*"

This holding is in line with that in the Andrews case, in which it was held that in principle there is no difference between a time table sent by telegraph and the regular printed time table. No one will contend, if a collision resulted from an incorrect printed time table, but the company would be responsible; and it would not be permitted to go behind such time table to find excuse by laying the fault on the person who devised it, and say that such person was a fellow ser-

vant of an injured trainman from such collision; then why in case of a special time table? In *Oregon Short Line and U. Ry. Co. vs. Frost*, 21 C. C. Apps., 186, the facts were the same as in the Camp case, and the contention of the plaintiff below the same. The court held the company had discharged its duty when it had given information to one of its servants in the same common employment and directed him to deliver the order to the conductor. In the case at bar the company had not discharged its duty, in that it did not give *correct* orders, and did not deliver, or attempt to deliver any orders to the conductor of train 162 changing its schedule. In *Darrigan vs. R. R. Co.*, 56 Conn., 285, the court said:

"It is the duty of a railroad company to prepare a time table, and adjust the running of trains to it, as to avoid collisions. It must also devise some suitable means and *safe method* for the running of special or irregular trains."

If such is the case, and the company uses a local operator for the purpose of preparing the special schedule (for without his act it could not be created), then in what sense, in the act of *creating the schedule*, can it be said he was a fellow servant of the trainmen affected by what he did?

II.

It was as much the duty of the company to give correct orders for the running of its trains so they would not collide, as was its duty to see that its servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work. That the one furnishing

the tools is the agent of the master and not a fellow servant of the one using the tools and machinery. That for this agent's negligence the master is liable.

In *Hough vs. R. R. Co.*, 100 U. S., 213-226, this court said:

"Within the rule laid down in *Farewell vs. R. R. Co.*, 4th Met. 49, they are to guard the servant against such risks and perils of which he is not as likely to know as the master, and against which he cannot as effectually guard. Among such duties are supplying the servant with reasonably safe machinery and tools, because the servant has ordinarily no connection with their purchase, or their preservation in a suitable condition after they have been supplied. It is equally implied in the contract of service, that the master shall supply the *physical* means and *agencies* for the conduct of his business. It is also implied, and public policy requires, while selecting such means, he shall not be wanting in proper caution. His negligence in this respect is not a hazard ordinarily attending the business."

The reasons given why the obligation rests on the master to furnish tools and machinery which shall be reasonably safe are: One, because the servant has no connection with their purchase; the other, public policy requires such to be the law; both to the single purpose, that the master shall not expose his servant to a risk of which he is not as likely to know as himself, and against which he cannot as effectually guard. The master furnishes the tools and machinery with which the servant is to work. He ought to know whether they are reasonably safe, and not leave it to the servant to find out at the risk of his life. What is a special schedule for the operation of trains but a *physical*

means, or *appliance*, in accord with which the trains are operated? The court said in the Andrews case cited, "there is no difference in principle between the printed time table and one sent by telegraph." It certainly will not be contended that the printed time table is not one of the physical means in accord with which trains are operated, and if a collision should result because when run in accord with the same a servant was harmed, who was running the train, the company could escape liability? The company sent the order to 159 to run west, that brought this train in collision with 162. Trains cannot be run without a schedule, either printed or sent by telegraph. The trainmen have no connection with, neither are they in the same department with those who furnish the tools and machinery with which they are to work, or to see that they are kept in suitable repair. Neither are they in the same department, and have no connection with those who furnish the schedules or give orders which the trainmen use in running the trains. In fact there is better reason for the rule applying to schedules for the running of trains, than to tools and machinery, or a safe place in which to work. The engineer may have the opportunity to observe the condition of his engine. The brakeman to see that the ladder on which he mounts the car is out of repair, but as to the schedules which they use in running the trains, they have absolutely no connection with their creation, and have no opportunity to know whether they are correct, or any knowledge of any hazard that may be created thereby, and against which they can guard. No better illustration of this proposition can be made than is shown by the facts of this case. Every reason for the

rule that the master is obligated to furnish tools and machinery with which his servant is to work shall be reasonably safe, applies to making a schedule for the running of trains. That such duties are non-assignable is well settled.

Hough vs. R. R. Co., 100 U. S., 213.

N. P. R. R. Co. vs. Herbert, 116 U. S., 642-660.

It will not be contended, that the one who purchases the tools or machinery, or sees to the place where the servant works, is a fellow servant with the one who uses the tools or machinery, or works in the place, in *such sense* as to releive the master; if from his negligent act the tools or machinery, or the place is in fact unsafe. If the making of the schedule, or the giving the orders that caused the collision in the case at bar was one of the perils or hazards the trainmen on 162 did not assume, then what position does the operator sustain to the transaction as shown by the certified facts, if it be his negligence caused the collision? Evidently he was not a fellow servant of the trainmen on 162 in such sense as to releive the company from his negligence; for if he was such fellow servant, then it would overthrow the rule, and the company would escape liability, although it knew of the danger, and could have guarded the servant, and that with full knowledge that the servant was ignorant of the hazard and could not protect himself.

In analysis the rule laid down in the Farewell case is in harmony with that in the Baugh case, 147 U. S., 149—167. In the Farewell case, 4th Met., 49, the court said:

"The general rule resulting from considerations, as well of justice as policy, is, that he who engages in the employment of another for the performance of specified duties, takes upon himself the natural and ordinary risks and perils of the business, and in legal presumption the compensation is adjusted accordingly. We are not aware of any principle which would except the perils arising from carelessness of those who are in the same employment. *These are the perils of which the servant is as likely to know as the master, and against which he can as effectually guard. They are the perils incident to the service, and can be as distinctly foreseen and provided for in the rate of compensation as any other.*"

Here is laid down the doctrine of assumption of risks by the servant. They are such as are naturally and ordinarily attendant to the business. The test to determine what are such risks is, if the servant is as likely to know of them as the master, and can as effectually guard himself against them as the master, then they are such as he assumes by his contract of employment; but if the servant has not the same means of knowledge of them as the master, and cannot as effectually guard himself against them, then they are not the natural and ordinary risks of the employment, and the servant does not assume them. Taking it for granted that the train dispatcher at Missoula stood in the place of the master, and apply the above test to this case. Trainmen of 162 had no knowledge that the dispatcher had sent 159 west from Garrison, or Drummond, which caused the collision, When the dispatcher sent west 159 from those places he knew 162 was on the road east. He knew of the peril thus created, unless he made a meeting point for one train to pass the other, and had notified the trainmen of both

trains of this meeting point. Of this peril the trainmen of 162 were wholly ignorant, and could not protect themselves as the dispatcher could. The dispatcher could have held 159 either at Garrison or Drummond till he knew of the whereabouts of 162, and with absolute knowledge have made a safe meeting place for the two trains to pass, and have notified the trainmen of 162 of this place. Tho hours and twenty-seven minutes had elapsed from the time 162 had left Missoula when 159 arrived at Drummond. Bonita is only twenty-six miles east of Missoula. When the inquiry was made, when 159 was at Drummond, the train dispatcher under the circumstances should have known, that either 162 had passed Bonita, or was a wreck on the road between Missoula and Bonita. Trainmen on 162 had no knowledge of the facts and circumstances as the dispatcher, and could not as effectually guard themselves as the dispatcher. They had no means of protecting themselves as the dispatcher. It follows under the rule in the Farewell case, the peril to the trainmen by sending 159 west from Drummond and directing it to pass 162 at Bonita, was not one of the ordinary risks which the trainmen on 162 assumed. If it was not one of such risks, then that negligence which caused the injury was not of one who was a fellow servant of the trainmen on 162 in *such sense* as would relieve the company from responsibility. In the Baugh case, 149 U. S., 167, this court laid down the rule that all who enter the employment of a single master are engaged in a common service, are fellow servants, "*prima facie*" (i. e. unless rebutted), and some line of distinction than that of control must exist to destroy the relation of fellow servants. Hav-

ing done away with the thought or idea of superiority or control, it establishes the test to determine the liability to be, whether there was some personal wrong or breach of positive duty on the part of the master. Whether there was a breach of positive duty is determined by the nature and character of the act. The character of the act in the case at bar was: the company sent west from Garrison and Drummond train 159, knowing that 162 was on its way east, no one of its operatives having knowledge that 159 was on the road. By this act the positive duty rested on the company to make a place where the trains could pass each other and in some manner notify the trainmen of 162 of this fact. It owed this duty because it had created the exigency that demanded its discharge. The person whose negligence caused a breach of this duty, necessarily could not be a fellow servant in any sense of the trainmen of 162. Those risks of which the servant is not as likely to know as the master, and against which he cannot as effectually guard himself, are the perils which from their nature and character demands the master to protect the servant against, and for his failure to do so he becomes liable.

III.

The answer to the first question propounded should be: the local operator is not a fellow servant of train operatives in such sense as to exonerate the master from liability to operatives injured by obeying an erroneous order of the train dispatcher that was induced by false information given by the local operator.

We have shown that it was a positive duty of the

company to give *correct* orders for the running of these trains; to make a meeting place for them to pass, and in some manner notify the trainmen of 162 of this place; that the risk created by giving incorrect orders for their running was not one of the assumed risks of the operatives on train 162. That in no proper sense can it be said that the local operator at Bonita was a fellow servant of the operatives on train 162. The question is whether the operator when "*specially inquired of by the dispatcher.*" Our contention is: it was the duty of the dispatcher to give correct orders for the meeting of the trains, and in some manner notify the trainmen of 162 of them. That in the transaction which took place between the dispatcher and the operator, the latter was not consociated with any of the trainmen, but was consociated with the dispatcher, who stood in the place of the master. The lower court held the rule to be, and it is in accord with the weight of authority, "that a telegraph operator in delivering orders from the dispatcher to the trainmen is a fellow servant of the trainmen; that he was acting with reference to the movement and safety of the trains in the same manner that a flagman or a switchman would be in the discharge of their duties. No case has been found, except in the case of *Bentz vs. R. R. Co.*, 99 Fed. R.. 657, that an operator or any one else, who answers any inquiry, with reference to what a train has done, or in respect to any condition of the road, that that part of service makes him a fellow servant with the train operatives." It cannot be said when the operator reported to the dispatcher that train 162 had not passed his station (when in fact it had), he was co-operating with the conductor of that train,

which was then running in accord with the orders that had been given it, and after it had passed his station. He was answering the dispatcher solely as to a condition of the road. But it may be said, if the operator had given a correct report, the dispatcher could have stopped and held 159 at Drummond, and have made Drummond a meeting point for the trains. Concede it, still he was not co-operating with the trainmen of 162 as to its movements. He was co-operating with the dispatcher as to the movements of 159. He and the dispatcher were attempting to get 159 through west without its colliding with 162. In so far as 162 was concerned, what the operator said had nothing to do with its movements. It had passed his station before the dispatcher called him; before 159 had arrived at Garrison from Butte. No telegraph offices were open between Missoula and Garrison except Bonita and Drummond. No. 162 could not have been stopped till it reached Drummond, because of the absence of any opportunity to reach it by telegraph, till it had reached Drummond. Had the operator told the truth all the dispatcher could have done, would have been to hold 159 at Drummond till 162 had arrived at that place. As the operator told a falsehood concerning the whereabouts of train 162, what effect did this have on the situation? If any, it had this: It prevented the dispatcher from holding 159 at Drummond. In no sense was he co-operating with, or consociated with the trainmen on 162, or with those on 159; *but was with the dispatcher in directing the movements of 159.* As between the trainmen on 162 and the company, it was its duty to stop 162 if it became necessary to prevent a collision. This follows because it had set it in motion.

Since the dispatcher sent out from Missoula 162, and from the time sent out, till the collision, it was running under the orders given it, and at no time could have been stopped before its arrival at Drummond, had the operator told the truth, he did not come between the dispatcher and the trainmen of this train, or in connection with them by anything he did; it follows that he had no connection with the men on this train, either in directing its movements, or stopping it after it had been started. The first question submitted involves the determination of the relation which the operator sustained to the trainmen on each of these trains. If for any reason he was related, by cooperating or otherwise, through the dispatcher with those on 159 (which we do not concede), he was not with those on 162, of which deceased was the fireman. The court to sustain its opinion as to the law cited *Dana vs. R. R. Co.*, 92 N. Y., 639. In connection with the Dana case we refer the court to *Shehan vs. R. R. Co.*, 91 N. Y., 332, both of the above cases growing out of the same accident. The facts were, train 50 was running east, and was due at Cayuga at 4:40 p. m. Train 337 was running west, and at Auburn. At 4:46 the dispatcher telegraphed the conductor of this train, "wild cat to Cayuga regardless of No. 50." As No. 50 was about to depart from Cayuga at 4:45 on its schedule, a collision between these trains was inevitable, unless something was done to prevent it. But the campany had an operator at Cayuga named Keiffer. At 4:10 the dispatcher telegraphed him: "Hold 50 for orders." Keiffer met the conductor of 50 and told him: "Orders hold 50 for 61." No. 61 soon afterwards came in, when the conductor of 50, relying on the re-

port of the operator, started his train for Auburn. Here was a false report of the orders from the dispatcher made to the conductor of No. 50 by the operator. Soon after No. 50 started it collided with 337, in which collision the fireman of No. 50 was killed. Keiffer was employed to receive and deliver messages, and send them when required. Under the facts as cited, the court said:

"No reason is given for not communicating with the conductor and engineer of 50 before it reached Cayuga, or at least on its arrival there. The defendant annulled its time table, made it imperative on No. 337 to move in spite of the pre-arranged right of No. 50, and not only omitted as to 50 the exceedingly proper and wise conditions on which 337 was permitted to obey, but failed to give any communication to 50. *The object should have been to prevent 50 from running according to its time table.* To secure certainty in this respect, the defendant should have communicated with the conductor and engineer of 50, that these servants would understand the object, etc. Two parties were involved, the master and its servants upon this train, and the only hazard was disobedience or forgetfulness on the part of those servants. In the method adopted another event was introduced, upon which the first was made dependent. Instead of communicating with the conductor and engineer, the defendant communicated with a third person, the telegraphic operator, and told him "to hold the train for orders." The train thereby became subject to his will, and the object in view became dependent on his memory, and his faithfulness in obeying the orders, and the probabilities of its attainment thereby lessened."

The court further said:

"The defendant had created the exigency and was bound in some way to adjust the running of train 50 to it, and for the consequences for the omission of any reasonable act tending thereto it was liable. It was

not enough to tell Keiffer to hold the train. The duty of holding it devolved on the defendant, and its breach of duty was not excused by showing that it would have been held if Keiffer had performed his duty."

In this case train 162 stands almost precisely as train 50, and train 159 as train 337. Train 162 was running under orders, and the company annulled its schedule, made it imperative on 159 to move west in spite of the pre-arranged right of 162; for it must be borne in mind that 159 was sent west from Garrison after 162 had left Missoula, and that, after it had passed Bonita, No. 162 had the right of way as No. 50 had. The time table of 50 was annulled by direction to Keiffer to hold it for orders. The time table of 162 was annulled by the direction of the dispatcher to the operator to notify the trainmen of 162 on its arrival to pass 159 at Carlan. When 159 reached Drummond, on the second inquiry, and the reply given it, the time table was annulled—to pass 159 at Bonita. In fact there was no annullment of the schedule of 162, but only an attempt to do so. Neither was there an annulment of the time table of No. 50, but the attempt. There could not have been unless the orders had been correctly reported by Keiffer. There being no annullment of the time table of 162, and it could not have been annulled till it had reached Drummond, and communicated with, 159 was sent west which caused the collision. The object should have been to prevent 162 from running according to its schedule time, and to secure certainty in this respect, the company should have communicated with its conductor, that these servants should understand the object in view. Two

parties were interested, the master and his servants on train 162, and the only hazard as to these servants was their negligence. Instead of communicating with them, the company communicated with a third party, the operator at Bonita, to make a place where their train should pass 159, and directed the operator to communicate with them. The only difference between the Shehan case and the one at bar is; in the Shehan case the operator made a false report to the conductor of train 50, because of which it went ahead and collided with 337. In this case the operator made a false report to the dispatcher, because of which 159 went ahead, and collided with 162. Under the circumstances of this case train 159 became subject to the will of the operator at Bonita, as held by the court in the Shehan case train 50 became subject to the will of the operator at Cayuga; and that he was acting in the place of the master in the very transaction. However, as to the movements of train 162, what the operator reported to the dispatcher had no connection, as it had passed his station before he had been called, and in no event could it have been stopped till it had reached Drummond, had the operator told the truth. What the operator said did not have anything to do with its movements, or stopping it after it had been started. He was not therefore a fellow servant with the man firing its engine.

IV.

If it is the law, that when an operator has been specially called upon by the dispatcher to give information relative to the arrival of a train at his station, to

enable the dispatcher to formulate orders for the movement of other trains, is discharging a master's duty, then he would not be a fellow servant of the trainmen in such sense as to releive the master from liability for injuries caused by his negligence. When the court in the Baugh case laid down the rule, "the servant has the right to look to the master for the discharge of a positive duty, and instead of doing it himself intrusted it to others, that does not change the measure of his obligation to the employe, and the question turned on the character of the act, than the relation of the employes to each other; and if the act is one in the discharge of a positive duty by him owing to the servant, then the negligence in the act is the negligence of the master;" it set the question at rest and settled the proposition that the author of the negligent act need not necessarily be some superior servant; and it matters not whether the negligent act be that of a local operator or train dispatcher. In this case the dispatcher had sole power to give orders for the running of trains. If he stood in the place of the master, and it was the master's duty to give correct orders for the movement of the trains in question, and held converse with the local operator in reference to the matter, then the operator would be the agent of the master, and discharging a duty personal to the master, and not a fellow servant of those affected by the orders which the master gave. Suppose it was the duty of the master to see that an iron rail was properly loaded on a car, and should call to his assistance one in his employ, and through the negligence of the one called, in the act of loading the rail, another servant not engaged in loading the rail, should be harmed,

would the one called to assist the master be a fellow servant of the one injured in *such sense* as to relieve the master from liability? It was the duty of the master to give correct orders for the movement of the trains in question. He called on the local operator to assist him, and through the negligence of the operator the fireman on train 162 is killed, who had nothing whatever to do with making the schedule, For what reason then can it be said that the fireman was a fellow servant with the operator in making the schedule? As applied to this case, in attempting to annul a schedule that had been made, with the making of which and the annulment of the same the fireman had nothing to do.

In *Dana vs. R. R. Co.*, 92 N. Y., 639, which the lower court cites as sustaining its opinion, the court said:

"No doubt the intestate on entering the employment assumed the ordinary risks attending the employment, but it is equally well settled, that employers cannot avail themselves of this assent unless they have taken reasonable precaution to insure the safety of the servant while in the performance of assigned duties. The principle therefore which secures this exemption has no application where the injury is traced to the employer's personal failure to take such precautions; nor where they knew of the existence of the danger of which the servant had no means of knowledge."

On page 641 and 642 the court said:

"Keiffer, the operator, was directed by the superintendent to hold 50 for orders. For Keiffer's act in this respect the defendant is clearly liable. The act he was required to do, and did perform, was one for which the master was responsible as a duty pertaining to itself, and as to it, Keiffer occupied the place of the master."

He was not then a fellow servant with the trainmen on No. 50 in such sense as to relieve the master from liability for his negligence in giving the false report to the conductor of No. 50. In this connection we call the court's attention to the following:

Flike vs. R. R. Co., 53 N. Y., 549.

Booth vs. R. R. Co., 91 N. Y., 38.

Ell vs. N. P. Ry. Co., 12 L. R. A., 97.

A local operator in a general sense (i. e., in most of the transactions in which he is engaged), may be a fellow servant with the trainmen, but that this is the case in transactions as shown from the facts in this case, where he has been called upon by the *dispatcher, who in the act done*, was not a fellow servant of the trainmen, cannot be true.

In *B. & O. Co. vs. Camp*, 13 C. C. Apps., 244, the court states the rule of law:

"He, the operator, and the engineer and conductor work together at the same time and place for a common employer, with an immediate and common object in view, namely the running of trains, etc. There should be provisions for *communicating* to those in charge of trains to avoid collisions. This information is given by means of the genaral time table and the general rules for the running of trains, with reference to each other, which employes in charge of trains are obliged to obey. But it often happens that the general time table must be varied from, and these variations must be *communicated* to those in charge of trains. This is effected by telegraph orders from the train dispatcher, who has supreme control over the movement of trains. The subordinate employe whose duty it is to transmit the orders of the officer in charge, or to give information as to the presence of trains on any part of the road *without special orders*, are engaged at the same time

with the persons operating the trains in a common employment, having an immediate common object, namely, that of running the trains, therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop, is as much engaged in the running and the operating of the train as the flagman sent out to signal the condition of the switch."

The reasoning of the court was applicable to the facts of the case under consideration. In the Camp case *correct* orders had been given and received by the local telegraph operator, to be by him delivered to the conductor on the arrival of the train; and the sole question was, whether in the act of delivering them, the local operator was a fellow servant of the trainmen to whom the orders had been addressed; the contention of the plaintiff below being, that the duty of the company was to bring to the actual *knowledge* of the conductor the orders which had been sent. The point which the court sought to illustrate was, when correct orders had been sent to the operator before the arrival of the train, to be delivered to the conductor, the duty of the company ceased, and because of the position of the operator, and the duties required of him to *transmit* the order to the conductor, to whom it had been addressed, his relation to the trainmen was the same as "the man who makes the signal at the station for the train to stop." It must be borne in mind that the court in its decision holds the local operator to be a fellow servant with the trainmen when his acts are without *special orders* from the dispatcher. The court did not intend to commit itself to, and as a settled proposition of law, that when the operator had been inquired of *specially* by the train dispatcher concerning

a thing personal to the master, that the act of the operator, in reference to that thing, was a co-worker with, and a fellow servant of the trainmen. This is correct, because on page 246 the court said, "the only obligation which the company can be held with respect to a communication of a sudden change in the running time by telegraph is, that so far as those who represent the company are concerned, all reasonable precaution shall be taken in *transmitting* notice of the temporary change. Transmitting notice of the change of orders is entirely a different thing than that of giving correct orders creating the change. The question before the court was that of transmitting notice of the change of the schedule by the operator to the conductor; and it uses the words *transmit* and *transmitting* to acts passing between the operator and conductor. This is true because the court said, "but it often happens the general time table must be varied from and these variations must be communicated to those in charge of trains. That is, when the dispatcher had sent correct orders to the operator to be delivered to the conductor, it had used due care in transmitting notice of the change." It would be absurd to construe the opinion of the court otherwise, because it held, "that it was the duty of the company to construct a temporary time table with such care and skill that it may be reasonably adopted to secure the operation of all the trains on the road without accident to passenger or employe."

In *N. P. Ry. Co. vs. Mix*, 121 Fed. Rep., 476, plaintiff was head brakeman on train 162, on which the intestate of plaintiff below was fireman at the time he

was killed. The facts are fully set forth in the opinion, and do not materially differ from those certified in this case. In the Mix case, it appears 162 east was to run extra to Helena, and meet the second Nos. 53 and 153 at Missoula, and extra 155 at Bonner. Therefore 53 and 153 had arrived at Missoula before 162 had left that station. No. 162 met 155 at Bonner, which is 7.4 miles east of Missoula. The facts constituting the negligence of the operator at Bonita were the same as in this case. The court instructed the jury:

"That it is the duty of the company to all operatives on its road to take all reasonable precautions to prevent opposing trains on its railway from colliding, and to exercise all reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of another in the opposite direction, *and to give such orders as will insure the safe passage of one by the other.*"

As we understand the instructions, if the jury found from the facts that such orders had not been given as would insure the safe passage of one train by the other, then it would be justified in finding the right of recovery in the plaintiff. If the instruction is the law, then in no sense was the operator at Bonita a fellow servant of the trainmen on 162. If he was, then the Circuit court of Apps. would have been bound to have held the instruction incorrect. The same court which decided the case *Oregon Short Line & U. N. Ry. Co. vs. Frost*, 21 C. C. Apps., 186, rendered the opinion in the Mix case. The Oregon Short Line case was based on the Camp case. The court in the Mix case say, page 480:

"Moreover, because we held in *Oregon Short Line and U. Ry. Co. vs. Frost*, as other courts, that a local

operator in *delivering* orders from the train dispatcher to the trainmen is a fellow servant of the latter, it by no means follows, that in answering inquiries of the train dispatcher upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen."

It is contended, that when a statement passes through the master, and is reported to the operator in the same form in which it is received, or when it takes the form of an order, which is a proper one, it is the same as if it had passed between those who were confessedly fellow servants. That is, when the operator at Bonita reported to the dispatcher 162 had not passed his station, and the dispatcher reported to the operator at Drummond that 162 had not passed Bonita, itwas the same as if the operator at Bonita had reported directly to the operator at Drummond; that it amounts to the same thing, when on the report, the dispatcher gives an order, based on the report to him; that it is the same as when a flagman reports the condition of the switch. To say the most, this is an ingenious method to eliminate the dispatcher from the transaction, and to relieve any railroad company from all liability from errors that pass through the dispatcher's office. Since all the information a dispatcher has as to the whereabouts of trains come from operators along the line of the road, it presents a wholesale method of relieving the company from liability for most collisions. The vice of the proposition is, that it takes for granted that the master owes no duty to give such orders for the running of trains that will not result in collision, and that he can change the schedule of times of running, without giving any information to those engaged in the running of the trains obediently to orders pre-

viously given them. The proposition has no parallel in the case where the flagman reports the condition of the switch to the engineer, because the master owes no positive duty to the engineer or operative of the train that the switch shall be properly set, or that the signal shall be set white or red.

It is claimed that the operator at Bonita had nothing to do with performing a master's duty. We have argued this proposition in the III. Subdivision hereof. Here was a transaction between the dispatcher and the operator to get 159 west from Garrison without its colliding with 162, to make a place for the trains to pass and in some manner notify 162 of this place. If the operator was in any sense a fellow servant with the trainmen, then the dispatcher was, because both were attempting to do the same thing. If the company under these circumstances is not liable for the act of the operator, then it would not be had the accident occurred through the fault of the dispatcher alone, and without having communicated with the operator.

V.

The opinion of the court in the case of *Illinois Cent. R. R. Co. vs. Bentz*, 40 C. C. Apps., 56, is in direct conflict with that rendered in this case. I do not find the opinion of Judge Lochren in this case published, is the reason for setting out a synopsis of it. After setting out the facts as per agreed statement the court said:

OPINION.

"It is undoubtedly a rule of law, and a reasonable

one, that a railroad company should provide safe schedules of times for the running of trains so there will be no danger of collisions, if the times were observed by the men in charge of the trains running thereunder; and if from any reason the ordinary schedules have to be departed from, as they are continually, and perhaps it is as suggested by counsel, a matter of daily experience, that certain trains, especially freight trains, are run without any general time table; still it is the duty of the railroad company under circumstances of this kind, to use reasonable care to advise those in charge of trains on the road of the movement of other trains, so as to prevent collisions. As I understand the law, the duty is not absolute so as to make the company a warrantor of the receipt of information by the person who ought to have informed the conductor or engineer. The decisions do not seem to be entirely uniform in this respect.

In the case of *Dana vs. N. Y. & H. R. R. Co.*, 92 N. Y., 639, the holding seems to be as to the operator whose duty it was, having received a notice by telegraph to communicate it to the conductor or engineer on the train, that his failure to do that, or the making a mistake by him in doing it, was attributable to the master; and that he was doing a master's duty by giving notice to the trainmen; and that by a mistake which he made, when he was directed to hold train No. 50 for orders, instead of that he notified the trainmen that it was to wait for 61, it was held that the mistake was attributable to the master, and that the railway company was liable for the collision that occurred by the train leaving when it should have remained there.

In the case of *R. R. Co. vs. Camp*, 65 Fed. Rep., 952, and *Oregon Short Line vs. Frost*, 74 Fed. Rep., 965, the rule seems to be laid down, and I think is in accordance with the weight of authority, that a telegraph operator in delivering such orders from a train dispatcher to the trainmen, is in the position of a fellow servant of the trainmen in doing that duty; that he is

acting in reference to the movements and safety of the train, in the same manner that a flagman or a switchman would be acting in the performance of any duty in connection with the movement, or the operation of the train, and participating therein. As far as that service affected the movements of the train, he would be a fellow servant of the trainmen. But no case that I have seen, unless it be that of *R. R. Co. vs. Bentz*, 99 Fed. Rep., 657, which has not been read, though it has been stated by counsel, briefly, on both sides, no case has been read in full, that holds the operator, or any one else, while he is not acting in connection with the movements of the train, who takes any action, or answers an inquiry, with reference to what a train has done, or in respect to any condition of the road, that that sort of service makes him a fellow servant with the operatives upon any train; and it does not strike me that it can be true. It is reasonable perhaps, that in delivering an order to a conductor or engineer while a train is at a station, that he is acting in reference to its movements the same as a flagman, or a switchman, and in performing that duty, he is a fellow servant with the trainmen; but after the train has left his station and has gone away, so that he can no longer affect its movements and has no control over them, I do not see how he would be longer a fellow servant of the trainmen."

In the Bentz case, in which the facts were the same as the one at bar, the court said, and this is all it did say on the question of fellow servantship:

"The failure of the operator to keep the train dispatcher advised as to the whereabouts of Bentz's train, was the cause of the collision, unless Bentz contributed to it by his own negligence. We have decided in this court in the case of *R. R. Co. vs. Camp*, 13 C. C. Apps., 233, that at common law a telegraph operator is a fellow servant with the engineer. See

Railroad Co. vs. Clark, 6 C. C. Apps., 281.

Slater vs. Jewett, 85 N. Y., 61.

Sutherland vs. R. R. Co., 125 N. Y., 737.

McKaig vs. R. R. Co., 42 Fed. Rep., 288."

The court simply refers to the Camp case and others to sustain its position. If the facts in the cases are so different from those in the case it had under consideration, it does not follow that the law applicable to them would be so to the case which the court was considering. In the Camp case accurate orders had been given by the dispatcher, without any converse with the operator as to the whereabouts of any train. They had been received by the operator, who failed to deliver them on the arrival of the train. The facts in the Slater case were the same as in the Camp case. In the Clark case no communication was had by the dispatcher with the operator in reference to the trains. The court on page 286 of opinion says:

"The negligence of Jenkins, the operator, did not arise from his failure to perform a duty which was imposed upon him because he was a telegraph operator."

The McKaig case was one where the operator had been directed by the dispatcher to put out the signal to stop a train. He was not performing any duty which pertained to his office as operator in giving information to the dispatcher to enable him in the performance of a master's duty. No case can be found except the Bentz case which holds, where the operator had been called upon *specially* by the dispatcher to give information to enable him to give orders for the movements of trains, that in that act, the operator was a fellow servant of the trainmen affected by what the dispatcher did. The court in the Bentz case holds that the decision in the Camp case sustains its opinion;

while the court in the Mix case, which was based on the Camp case, says, "that because it had held in the Frost case that a local operator in delivering orders from the dispatcher to the trainmen was a fellow servant with the trainmen, it by no means followed that in answering inquiries of the dispatcher, upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen." In the Charless case the court said:

"There are decisions holding that a telegraph operator does not occupy the position of the train dispatcher merely because he transmits or delivers orders for the movement of trains, and that his negligence cannot be said to be the negligence of the company; but it is not necessary in this connection to determine the actual duty of a telegraph operator."

When we analyze the cases to which the court refers in the Bentz case to sustain its opinion, we find they do not in law sustain that opinion. The holding in the Bentz case is, because it can be made to appear that a local operator is a fellow servant of the trainmen under one state of facts, therefore he is under all circumstances.

VI.

The first question propounded is, whether an operator when called upon *specially* by the train dispatcher to enable him to give orders, is the operator a fellow servant of the trainmen? The second question, is the negligence of the operator in *observing* and reporting to the dispatcher the movements of trains past his station that causes an injury, that of a fellow servant or a vice principal? As applied to the facts of this case, it

may be conceded the operator was negligent in failing to observe and to report that 162 had passed his station. He was so negligent, because a rule of the company made it his duty to so report; but that such negligence caused the injury complained of is not in fact true, because we have shown if he had reported, there is nothing in the facts certified, that the dispatcher gives orders for the movements of trains on such reports. Furthermore, if it was the duty of the dispatcher to give orders *only* on such reports, then it was his negligence which caused the collision, because he gave orders without such report. As to the abstract proposition of law, whether the negligence of an operator in *observing* and *reporting* by telegraph the movement of trains past his station, which causes the death of a fireman of the company, is the negligence of a fellow servant of the fireman or a vice principal, the answer should be, that he is a vice principal. As we understand the question, the negligence, if any, consists in failing to observe and to report, as well in making an incorrect observation and a wrong report based on such observation, as if he had reported train No. 23 had passed his station, when he should have observed and reported train No. 25 had passed. In the illustration, the negligence would be in *observing* and *reporting*. We do not think the court under the certified facts intended we should discuss the question of law arising from the illustration, though to do so, is within the wording of the question. To answer the first question by holding that a telegraph operator, when called upon *specially* by the dispatcher to enable him to formulate orders for the movement of trains, the operator in giving such information is not a fellow

servant of train operatives, is to decide the case for the defendant in error. To hold the local operator under the circumstances stated in the first question was a fellow servant (strictly speaking) of the train operatives, decides the case in favor of the plaintiff in error; that is, provided the negligence of the operator was the proximate cause of the collision. What action this court will take as to the materiality of the second question, we do not know, and will discuss it. We have referred to the Shehan and Dana cases, wherein the court held, that the local operator in telling the conductor of train 50, "orders to hold 50 for 61," when his orders were to "hold 50 for orders," he was acting in the place of the master and a vice principal. The fact the company had adopted a rule requiring operators to report to the dispatcher the passage of trains past their stations and the direction in which extra trains are running, does not create the relation of fellow servantship between the trainmen and operator. What constitutes fellow servantship is a question of law under the facts of each case. Our contention is, if it is the duty of the company to give such orders for the running of trains for those operating them, and it is permitted the company to go behind the dispatcher, then the real question is, are the trains in any way subject to the will of the operator in regard to their movements. If they are, then in so far as the duty which the company owes to train operatives he is a vice principal. If two trains are set in motion running in opposite directions on the same track, the nature of the act requires a meeting place to be made for them to pass, and the trainmen timely notified of the place to avoid collision. This arises from the character of

the act, and it must follow that whoever is brought in connection with the making the meeting point, is necessarily performing a master's duty. The courts have held the dispatcher to be a vice principal.

M., K. & T. Ry. Co. vs. Elliott, 42 C. C. Apps., 188.

Lewis vs. Seifert, 116 Pa. St., 627.

B. & O. R. R. Co. vs. Camp, 13 C. C. Apps., 233.

Hankins vs. R. R. Co., 142 N. Y., 416.

Harrison vs. R. R. Co., 79 Mich., 407.

We have shown in Subdivision III of this argument, that the operator is consociated with the dispatcher in making the schedules, the duty of which belongs to the master. From the very nature of the transaction, if the trains are moved on a schedule created from any information, however furnished by the operator, then there is the better reason why the operator should be held to be a vice principal than the train dispatcher. It will be conceded if a dispatcher without any converse with the operator gives an incorrect order for the movement of trains that brings about a collision, the company would be responsible; then why is it not true, if a dispatcher gives an incorrect order based on a false report of the operator, the operator is not a vice principal, and the company liable. If the trains are caused to be moved by the dispatcher in the first instance, why are they not by the operator in the second. If this is true, then there is no reason why a distinction should be made between the dispatcher in one case and the operator in the

other. In the Baugh case the doctrine is laid down, that some other distinction than that of control must exist to destroy the relation of fellow servantship; and the test is, whether the act was one which from its character it was the duty of the master to perform. Such being the case, if the trains are moved on the inition of the dispatcher, and he is a vice principal, doing a master's duty, then it must be true, if the trains are moved on orders *created by report from the operator* to the dispatcher, and as to the trainmen, the operator stands to them in the same relation, where they are caused to be moved on his report, as the dispatcher sustains to them, when they are moved by *him* without any report from the operator. While the operator does not determine when they shall be moved, or pass each other, still the fact of their being moved is determined by him. The certified facts are, the dispatcher had sole power to give orders for the running of the trains; such being the case, he might or might not direct them to be moved on the report of the operator; therefore, for what reason can it be said, the failure of the operator to report the passage of trains by his station or his negligence in observing and reporting can be the proximate cause of injury from giving a false report? If it is his duty to observe and report the passage of trains past his station, and does not report (as was the case of the operator at Bonita) and afterwards the trains were moved by the dispatcher, after he had made *special* inquiry of the operator, as appears in this case, on what grounds can it be said, that the negligence of the operator at Bonita in failing to observe and report as required by the rule of the company, was the proximate cause of the collision

that caused the death of the intestate of defendant in error. The trains cannot be made to move by something the operator don't do (i. e., failure to report and observe), and they are moved afterwards (as they were in this case), it must have been by the dispatcher, or the operator when *specially* called upon to give information as to other trains, then in no sense was the operator a fellow servant of the trainmen in the transaction that caused the collision, or his fault the proximate cause of it. If the trains are moved from something the operator does, since it is the master's duty to make a schedule in accordance with which they are to be moved, then if in *any sense* the dispatcher can be said to be a *vice principal*, it must be the operator is one, and not a fellow servant of the trainmen in a transaction which causes a collision. If the operator is negligent in observing and reporting to the dispatcher the passage of trains past his station, as in the illustration heretofore stated, and from the wrong observation and report, the dispatcher gives an order that causes a collision, the operator's act in relation to the matter is that of a *vice principal*, because it was the master's duty to cause such orders to be given for the running of the trains to the persons engaged in operating them that would be reasonably safe. In this connection we call the court's attention to *Hall vs. Galveston & S. R. R. Co.*, 39 Fed. Rep., 18. A rule of the company made it the duty of the local operator to report defects in the road or bridges, or obstructions, to the nearest section or bridge foreman. In the discharge of this duty the court held the operator was a vice principal, and not a fellow servant of the trainmen. We have attempted to show that the holding in

the Camp and Frost cases are based on a different state of facts from the one at bar. That the court in the Mix case held the law applicable to these cases, is not so to the facts in this case. This court in *Price vs. R. R. Co.*, 145 U. S., 651, in which the facts were the same as in the Camp case, refused to hold that a local operator in delivering orders to the conductor on the arrival of the train was a fellow servant of the trainmen. The opinion of the lower court was affirmed without an opinion, the court being equally divided on the question.

Respectfully submitted,

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